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No. 86-1379

In the Supreme Court of the United States

October Term, 1986

CLARENCE MOYER JR.,
Petitioner,

vs.

RICHARD PETTY, Sheriff,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER QUESTION OF LAW

Respondent submits that the question presented by the Petitioner in this case is more properly stated as follows:

1. Whether the State of Ohio is collaterally estopped from proceeding against the Defendant when the State's witness is called as a rebuttal witness to rebut the Defendant's motive, intent, or absence of mistake in another prosecution for similar but separate and distinct factually alleged criminal acts.

TABLE OF CONTENTS

Counter Question Of Law I
Table Of Authorities II
Objections To Jurisdiction 1
History Of The Case 2
Reasons For Denying The Writ 4
Conclusion 9

TABLE OF AUTHORITIES

Cases

Ashe v. Swensen, 397 U.S. 436 5
Middlebrooks v. United States, 457 F.2d 657 (5th Cir. 1972) 8
United States v. Bowman, 609 F.2d 12 (1979) 6
United States v. Johnson, 697 F.2d 735, 741 (6th Cir. 1983) 6
United States v. Redman, 500 F.Supp. 453 (D. Del. 1980) 7, 8
United States v. David Robinson et al., 588 F.2d 1041 (5th Cir. 1979) 7, 8

Rules

Ohio Rules of Evidence 404(B) 3, 4

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OBJECTIONS TO JURISDICTION

There is no substantial federal question involved which would require this Court to review the instant case.

The question herein presented was raised in the Richland County Common Pleas Court, the Richland County Court of Appeals, Fifth District, the Supreme Court of

Ohio, United States District Court for the Northern District of Ohio, Eastern Division, and the United States Court of Appeals for the Sixth Circuit.

Petitioner's claim of issue preclusion under the Doctrine of Collateral Estoppel in the Richland County indictment was denied in the Richland County Common Pleas Court and that ruling was affirmed by the Richland County Court of Appeals, Fifth Division. The Supreme Court of Ohio denied Petitioner's motion for leave to appeal. Petitioner again raised the issue by Habeas Corpus in the United States District law for the Northern District of Ohio, Eastern Division, and was denied the writ by the recommendation of the magistrate and thereupon by entry and decision of the Judge. The United States District Court of Appeals sustained the District Court.

The Ohio and United States Courts decided the issue in accordance with statutes of the State of Ohio, the Constitution of the United States and applicable decisions of this Court.

No substantial federal question is presented by the instant Petition for Certiorari.

HISTORY OF THE CASE

In April 1983, Petitioner, Clarence Moyer, Jr., was indicted by the Grand Jury of Summit County, Ohio, on eight counts of receiving stolen property (automobile parts). The case was subsequently transferred to Crawford County, Ohio, but will be referred to herein as the Summit County trial. While awaiting trial, Petitioner Moyer was indicted by the Grand Jury of Richland County,

Ohio, on thirteen counts of receiving stolen property (automobile parts).

In February 1984, the trial on the Summit County indictment took place. During this trial, the prosecution sought to establish that Petitioner Moyer knowingly purchased stolen automobile parts from one Cory Mathews. Petitioner Moyer testified in his own defense that he had no intent to purchase stolen automobile parts. To attack Petitioner Moyer's credibility, the prosecution called one Charles Long as a rebuttal witness. Mr. Long's testimony was admitted under Ohio Rule of Evidence 404(B) which allows the introduction of evidence of other crimes for the purpose of proving motive . . ., intent, . . . knowledge, . . . or absence of mistake or accident (A47). Mr. Long testified that Petitioner Moyer knowingly purchased stolen automobile parts as well as committed acts that would prevent the tracing of stolen parts (A50-58). The purchases that Mr. Long testified to are the subject of the Richland County indictment. Despite Mr. Long's testimony, Petitioner Moyer was acquitted on all counts of the Summit County indictment.

Subsequent to the Summit County trial, the Richland County prosecutors sought to try Petitioner Moyer on the Richland County indictment. Petitioner Moyer filed a motion to dismiss the indictment on the ground that a trial under the Richland County indictment would violate his Fifth Amendment rights prohibiting double jeopardy since he had previously been acquitted of receiving stolen property at a trial where the issue of his dealings with Mr. Long had been introduced. On May 22, 1984, the Richland County Court of Common Pleas dismissed Petitioner Moyer's motion.

REASONS FOR DENYING THE WRIT

THE STATE OF OHIO IS NOT COLLATERALLY ESTOPPED FROM PROCEEDING AGAINST THE DEFENDANT WHEN THE STATE'S WITNESS IS CALLED AS A REBUTTAL WITNESS TO REBUT THE DEFENDANT'S MOTIVE, INTENT, OR ABSENCE OF MISTAKE IN ANOTHER PROSECUTION FOR SIMILAR BUT SEPARATE AND DISTINCT FACTUALLY ALLEGED CRIMINAL ACTS IN ACCORDANCE WITH OHIO RULES OF EVIDENCE, RULE 404(B).

Petitioner's claim that an ultimate issue of fact in the Richland County indictment had already been litigated in the Summit County case is untenable if the Court looks to the elements of the respective criminal charges in the two criminal cases, or the testimony of Charles Long as it was presented in the Summit County case.

The Summit County cases involve automobiles stolen and dissassembled in Summit County and parts delivered to the Defendant in Crawford County by Cory Mathews. (Petitioner's Petition for Writ of Certiorari, Appendix 24.) The Richland County case involves 26 counts pertaining to 13 automobiles which were stolen from Richland and other counties, all of which were disassembled in Richland County and parts delivered to the Petitioner in Crawford County by Charles Long and others. (Id. at 24-25.) There is no evidence before the Court to show that Charles Long and Cory Mathews were associated or even acquainted. There is no automobile or part therefrom in the Summit County indictment that serves as the basis of a charge in the Richland County indictment.

In the Summit County trial, Petitioner testified. (Petitioner's Petition for Writ of Certiorari, Appendix A46-A50.) He denied he kept a special room with hot engines (Id.), or a dump truck to transport hot parts (Id.), or that he had ever primed over all engine numbers (Id.). Clarence Moyer states, "I had no intent to buy stolen automobile parts." (Id.) "If I bought them it was by accident or mistake." (Id.)

Charles Long was called as a rebuttal witness. He testified specifically attacking Defendant's testimony that he had never stolen parts, never primed VIN numbers on automobile engines, and never removed federal stickers. (Id. at 50-58.) Charles Long testified that he had delivered stolen engines to Defendant and had discussed with the Defendant that the stickers and numbers had been removed. (Id. at 50-58.)

Both the Summit County indictment and the Richland County indictment have alleged in each count that the Defendant knew or should have known that the automobile parts described in each count were stolen. It is this common element upon which the Petitioner seeks to assert collateral estoppel, yet the knowledge or reason to have knowledge alleged in each count relates to separate and distinct automobile parts.

Respondent agrees with the correctness of the authority cited by Petitioner that the principal of collateral estoppel mandates that, once an ultimate issue of fact has been determined by a valid and final judgment, that issue cannot be litigated again between the same parties in a future lawsuit. *Ashe v. Swensen*, 397 U.S. 436; that the principal of Collateral Estoppel has been embodied in the Fifth Amendment guarantees against double jeopardy.

Id. at 445; and specifically, the test set forth in *United States v. Johnson*, 697 F.2d 735, 741 (6th Cir. 1983).

The state is not attempting to separate charges and pursue them separately in different counties. The evidence presented in the Summit County trial could not have established that there was one transaction from the same source. There were at least two independent sources, Cory Mathews and Charles Long. Furthermore, the charges in the two counties are based on different episodes. There is no evidence in the record that the alleged acts of receiving stolen property occurred simultaneously or were somehow part of the same transaction. There is no evidence that Cory Mathews and Charles Long knew of one another before the indictments. From the evidence presented in Crawford County the only reasonable conclusion was that Cory Mathews and Charles Long transacted their business independently with Petitioner and not as "one course of criminal conduct".

Authority cited in support of Petitioner's contention is factually distinguishable from the case at bar.

United States v. Bowman, 609 F.2d 12 (1979) pertains to one factual pattern giving rise to two counts in the indictment. In the *Bowman* case, the Government relied on identical facts to support both Count II and Count III in the Indictment. (Id. at 18.) Bowman, a criminal suspect, was charged in Count II with corruptly endeavoring to influence, intimidate, and impede George Jackson as a witness and corruptly endeavoring to influence, obstruct, and impede the due administration of justice in Count III, both supported by the identical facts. Jackson was acquitted in a first trial on Count III and the jury was hung on Counts I and II. At a subsequent trial, Jackson was found guilty on Counts I and II. Thereafter, Jackson challenged

the conviction as to Count II on the grounds of collateral estoppel. The Court looked to the fact that the government relied on the same evidence for convictions in both Counts II and III and secondly that the testimony was identical.

Factors pertinent to the Court's reasoning are not present in this case. The evidence presented in the Summit County case upon which a conviction could only be sustained was by Cory Mathews. Charles Long offered no testimony concerning any of the transactions of the Summit County indictments. Charles Long testified only generally as to his dealings with Petitioner on rebuttal and in response to Clarence Moyer's testimony. (Id. at 42-49.)

Secondly, the testimony in the Richland County trial would not be identical. The testimony would relate to separate transactions involving the allegations of the Richland County indictment.

In *United States v. Redman*, 500 F. Supp. 453 (D. Del. 1980) the Defendant was engaged in continuous course of conduct of kidnapping his sister-in-law in one county and raping her in another. The Court's finding was that a jury verdict of not guilty by reason of insanity on kidnapping in one county necessitated a double jeopardy bar as to a conviction of rape in the other county. The Court in arriving at that decision examined the record of the first trial and concluded that the jury could not have reached a verdict of not guilty by reason of insanity without determining that the Defendant was mentally ill during the entire series of actions. (Id. at 457.)

United States v. David Robinson et al., 588 F.2d 1041 (5th Cir. 1979) also involved a "continuous course of conduct" fact pattern. The Defendant, Robinson ran a Dallas based gambling operation which layed off bets from satelite

operations in Amarillo and elsewhere. Defendant was convicted in Dallas. The Court refused a subsequent charge in Amarillo against the Defendant finding after looking to the facts upon which Defendant was convicted of in Dallas.

The issue in *Middlebrooks v. United States*, 457 F.2d 657 (5th Cir. 1972), *cert. denied* 409 U.S. 848 (1972) also was a continuous course of conduct. In the case sub judice, the Respondent has never sought to establish that a continuous course of conduct between the transactions in the Summit and Richland County indictments. The only continuous course of conduct Respondent has ever sought to establish is between Petitioner and Charles Long in their dealings over the period in the Richland County indictment. Accordingly, *United States v. Redman, United States v. Robinson,* and *Middlebrooks v. United States* are all factually distinguishable. While the law is correct, it is inapplicable on the facts herein.

The application of the doctrine of collateral estoppel in the case sub judice is inappropriate. There is no common fact or relationship of the transactions in the Richland County indictment to those in the Summit County indictment. Charles Long's testimony was rebuttal for limited purpose to show absence of mistake, motive, or in scheme. Nowhere in the Summit County trial did Charles Long testify as to the specific transaction making up the Richland County indictment. The "guilty knowledge" which Respondent maintains has been litigated relates to specific transactions not part of the Richland County case.

Respondent respectfully asks this Honorable Court to affirm the United States Court of Appeals and to deny this petition.

CONCLUSION

The Respondent, State of Ohio, submits that the Petition herein fails to present any question of constitutional dimension justifying review by the Court. The Petition for Writ of Certiorari must be denied.

Respectfully submitted,

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